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Via E-Mail

Federal Trade Commission
Office of the Secretary
Room H-159 (Annex R)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: FACT Act Prescreen Rule, Matter No. R411010

Ladies and Gentlemen:

The American Council of Life Insurers ("ACLI") is pleased to submit this comment to the Federal Trade Commission (the "Commission") in connection with the Commission's request for public comment on its proposed rule concerning the prescreen opt-out disclosure provisions. 69 *Fed. Reg.* 58861 (October 1, 2004). The Commission's proposed rule implements § 213(a) of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") ("§ 213(a)").

ACLI is the principal trade association of life insurance companies whose 383 member companies account for 73 percent of the assets of legal reserve life insurance companies, 70 percent of life insurance premiums and 77 percent of annuity considerations in the U.S. ACLI members are also major participants in the pension, long-term care insurance, disability income insurance and reinsurance markets. ACLI member companies engage in prescreening activities in connection with making firm offers of insurance to prospective policyholders, insureds and annuitants. Accordingly, ACLI and its member companies have a significant interest in the Commission's proposal.

SUMMARY

ACLI is concerned that the Commission's proposed rule does not accomplish the objective established by § 213(a) to present the disclosures required by § 615(d) of the Fair Credit Reporting Act ("FCRA") in such format, type size and manner as to be simple and easy to understand. ACLI believes that the layered notice requirement proposed by the Commission will prove confusing and less meaningful to consumers who receive prescreened offers of insurance. In addition, the Commission's proposal fails to consider that many prescreened insurance offers are presented in a format such as a one-page offer or self-mailer that is not conducive to a layered notice. Moreover, in view of the fact that it is highly unlikely that prescreened offers of insurance will lead to identity theft or fraud, ACLI sees little benefit in applying the proposed layered approach to prescreened offers of insurance. Finally, we believe that the 60-day effective date does not provide sufficient time to implement a final rule because of the considerable lead time needed to prepare and produce prescreened offers of insurance.

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DISCUSSION

The Commission's proposal requires a layered notice consisting of an initial statement that provides basic opt-out information and a separate, longer explanation that offers further details. ACLI objects to the layered notice requirement for the following reasons and urges the Commission not to adopt such a requirement.

The Commission's Layered Notice Requirement is Not Consistent With the Intent of Congress

Prior to enactment of the FACT Act, the FCRA required a person who uses a consumer report in connection with a credit or insurance transaction that is not initiated by the consumer to provide the consumer with a statement that includes the address and toll-free telephone number of the notification system maintained by the credit reporting agencies that enables the consumer to exclude his or her name and address from such solicitations. FCRA § 615(d)(2). The FACT Act amended this provision of the FCRA to direct the Commission to adopt a rule that provides that this statement be set forth in a format, type size and manner that is simple and easy to understand. § 213(a). The House Report on H.R. 2622, which became the FACT Act, contains the following statement of Congressional intent:

> Anyone using a consumer report in connection with an unsolicited insurance or credit transaction must include, in the required disclosure statement to the consumer, a description in a simple and easy to understand format of how the consumer can prohibit his file from being used for unsolicited insurance and credit offers including the simple and easy-to-use method for notifying the consumer reporting agencies. *The Committee believes that most current notification systems (such as toll-free phone numbers with straightforward choices) and disclosures permit consumers to notify consumer reporting agencies of their desire to limit pre-screened offers in a simple and easy manner.* This section is intended to ensure that as technology evolves and different notification and disclosure methods are experimented with that consumers will be protected by a standard requiring that any new system continue to be simple and easy to understand and use.[1] (Emphasis added)

The above legislative history suggests that Congress perceived that most current disclosures made in connection with prescreened offers are simple and easily understood by consumers. Accordingly, we see no reason why the Commission should impose burdensome layered disclosures on insurers and others when Congress indicated that most current disclosures are not a problem.

Insurers Should Not be Subject to the Layered Notice Requirement

The Conference Committee report of the FACT Act indicates that an important goal of the FACT Act was to reduce the incidence of identity theft.

> It is the conferees' belief that this legislation will assist the victims of identity theft, and ensure the operational efficiency of our national credit system by creating a number of preemptive national standards.[2]

[1] H.R. Rep. No. 108-263 at 49-50 (2003).
[2] H.R. Rep. No. 108-396 at 66 (2003).

One of the purposes of § 213(a) and FCRA § 615(d) is to enable consumers to opt out of receiving prescreened offers in order to avoid becoming victims of identity theft. For example, a thief could take a prescreened credit card offer from a consumer's mail box and request that the company making the solicitation send the consumer a credit card. When the credit card is delivered, the thief could steal it from the consumer's mail and use it under the guise that the thief is the consumer to whom the card was sent. Action which facilitates the ability of a consumer to opt out of prescreened offers of credit, therefore, could reduce the incidence of this type of identity theft.

ACLI is unaware of any instances in which prescreened offers of insurance have resulted in identity theft. Moreover, we fail to see how or why anyone would make use of prescreened offers of insurance to perpetrate identity theft, particularly since a thief would have to pay premiums before the insurance policy is issued. As a result, we believe that there is very little, if any, benefit to consumers in imposing the proposed layered approach on insurers. Accordingly, the burden the proposal imposes on insurers far exceeds any benefit that may result. Therefore, ACLI strongly recommends that the Commission provide an exception from the layered notice requirement for prescreened offers of insurance.

A Layered Notice Does Not Take into Account Insurance Marketing Practices

The Commission's layered approach is based upon the faulty assumption that all prescreened offers consist of multi-page solicitations. The proposed rule requires that the short notice appear "on the front side of the first page of the principal promotional document in the solicitation." Proposed 16 CFR § 642.3(a)(2)(iii). The short form must also direct the consumer to the existence and location of the long notice. The long notice must be set apart from other text on the page and begin with a heading which identifies it as the opt-out notice. Proposed 16 CFR § 642.3(b)(2)(iv), (vi). ACLI suggests that the Commission has failed to take into account the differences between prescreened offers of credit and insurance.

Prescreened offers of credit often consist of multi-page solicitations due to extensive regulatory disclosures required under Regulation Z and other laws. Prescreened offers of insurance, however, are not subject to Regulation Z-type disclosures. Accordingly, many prescreened offers of insurance consist of a single page or a fold-out self mailer that consumers may return to the company in order to accept the offer. There is no logical reason why a single-page offer of insurance should be required to have both a short notice and a long notice. Moreover, space constraints would make it extremely burdensome to comply with the proposed rule under current practices. Accordingly, because of the unique nature of insurance offers, ACLI recommends that the Commission's proposal not apply to prescreened offers of insurance.

The Layered Notice Requirement is Not Supported by the Research

The Commission's layered notice approach is based upon a consumer study it conducted to gain information about consumer understanding of prescreened opt-out notices.[3] ACLI believes that the conclusions set forth in the Commission's proposal do not support the application of a layered notice requirement to prescreened offers of insurance.

[3] "The Effectiveness of 'Opt-Out' Disclosures in Pre-Screened Credit Card Offers," by Manoj Hastak (September 2004) (the "Hastak Report"); "Credit Card Offer Study," by Synovate Public Sector Research Group (September 10, 2004) (the "Synovate Report").

The research did not address prescreened offers of insurance

The Commission relies heavily on the Hastak Report and the Synovate Report as the basis for its layered notice approach. However, the reports are based solely upon research with respect to prescreened credit card offers. Nothing in the research suggests that the results are applicable to prescreened offers of insurance. As indicated above, because of Regulation Z requirements, prescreened credit card offers require extensive regulatory disclosures. Prescreened offers of insurance, on the other hand, do not require similar types of disclosures. Accordingly, the conclusions drawn by the Hastak Report and the Synovate Report cannot be applied to prescreened offers of insurance. Therefore, the Commission cannot as a matter of law rely upon the Hastak Report and the Synovate Report as a basis for applying the proposed rule to prescreened offers of insurance.

The conclusions drawn are not supported by the research

The research first considered how effectively the message that the consumer has the right to opt out of receiving prescreened offers was delivered. The Commission acknowledges that the difference in effectiveness between the layered and improved versions of the notice in delivering this message was "less clear."[4] (The "improved version" used simpler language than the "current version" to describe the opt-out notice and was located on the back page of the offer.) Accordingly, the research does not support the use of the layered approach over the improved version with respect to delivery of the opportunity to opt out message to consumers.

The research also considered the effectiveness of delivery of the message and how consumers may opt out of receiving prescreened offers. The Commission suggests that the layered version was significantly more effective than the improved version, following an initial exposure to consumers, but not more effective after the consumer's attention was directed to the disclosure.[5] We believe that the data supporting the Commission's conclusion that the layered version was more effective than the improved version after the initial exposure is deficient in several respects. The data reported in Table 2 on page 6 of the Hastak Report fail to include consumers who viewed the improved version and responded that they also could opt out by writing to the consumer reporting agency. The Synovate Report indicates that four consumers responded that they could opt out by writing to the consumer reporting agency. *See* Synovate Report at 16. This increases the percentage of correct responses to 13.4%, which is significantly more than the 8.4% reported for the current version. Moreover, the question was asked of only those who responded affirmatively to the question of whether the notice stated that consumers could ask not to receive similar offers in the future. The Synovate Report provides that the question was asked of only 22 people who had responded positively to the improved version of the notice, and of only 41 people who responded positively to the layered version. Of 22 respondents queried who had viewed the improved version, 20 (90.9%) responded positively; of 41 respondents who had viewed the layered version, 34 responded positively (82.9%). Accordingly, the improved version of the notice may have delivered the message of how to opt out more effectively than the layered version.

The Hastak Report also concludes that the improved and layered versions were no more effective than the current version in communicating that opting out would not stop all solicitations. Hastak Report at 7. It also indicates that the improved and layered versions were no more effective than the

[4] 69 *Fed. Reg.* at 58864.
[5] *Id.*

current version in communicating there may be benefits to receiving prescreened offers. Hastak report at 8. Accordingly, the research does not support use of the layered approach in delivering these messages to consumers.

Based upon our review of the Hastak Report and the Synovate Report, we fail to see how the Commission can conclude that "[t]hese findings support the approach required by the proposed Rule."[6] ACLI believes that a further review of the research will reveal that it does not support the use of the layered approach when compared to a less burdensome approach such as the improved version.

Compliance Date

The Commission proposes that the rule become effective 60 days after the final rule is promulgated. The Commission has overlooked the fact that insurers already have mailings in process to send to consumers over the next several months. Many companies are well along in preparing pre-screened solicitations that they intend to send to customers over the next six months. Sixty days will not provide insurers with adequate time to revise solicitations and incorporate whatever requirements the Commission adopts in its final rule. It would be extremely disruptive to long-standing marketing plans and costly to require insurers to discard these solicitations or to revise them within sixty days in the manner called for in the Commission's proposal. Moreover, it would result in additional delays as well as additional production and reprinting expenses. ACLI believes, therefore, that a sixty-day effective date is inappropriate and uncalled for. Given the long production periods, we believe that at least six months is required to implement the Commission's final rule. Accordingly, we request that the effective date be at least six months after the Commission adopts the final rule.

ACLI appreciates the opportunity to provide its comments to the Commission. We would be pleased to answer any questions you may have regarding these comments.

Sincerely,

Roberta B. Meyer

[6] *Id.*